



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1993

Mr. J. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR93-160

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 18325.

The University of Texas Health Science Center in San Antonio (the "university") received open records requests from an individual for eight categories of information. You contend the requested information comes under a variety of exceptions to required public disclosure under the Open Records Act. We will discuss in turn each of the categories of information and the exceptions that you raise with regard to that information.

The requestor first seeks:

All information relating to misappropriated or missing funds in any program of the University of Texas Health Science Center, whether funded by the University or some other source, where Richard Schwartz acted as an employee or agent of the University; all investigations regarding Richard Schwartz and/or missing and/or misappropriated funds, with their outcome and action taken.

You contend that these records come under the protection of, *inter alia*, former section 3(a)(8) of the Open Records Act (now found at section 552.108 of the Government Code) because the university has transferred these records to the Bexar County District Attorney's Office during the course of a criminal investigation. You have forwarded to this office correspondence from Assistant Criminal District Attorney A.J. Dimaline in

¹The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

which he states that the investigation is ongoing and requests that the university "assert all exceptions and privileges available to prevent disclosure of the information." This office has previously held that where an incident involving allegedly criminal conduct is still under active investigation, section 552.108 may be invoked by any proper custodian of information relevant to the incident. See Open Records Decision No. 372 (1983) at 4. Because you have demonstrated that a criminal investigation regarding this matter is ongoing, the university may withhold these records at this time pursuant to section 552.108.

In his second open records request the requestor seeks:

Pleadings, discovery requests and answers thereto, motions, and communications (including settlement negotiations) between parties in lawsuits, relating to emergency medical services (EMS), which name as parties the [university] or any of its subdivisions, employees and/or agents.

You seek to withhold these records pursuant to former sections 3(a)(1), 3(a)(2), 3(a)(7), and 3(a)(11) of the Open Records Act.² Although you have submitted to this office what we assume to be a representative sample of such documents, you have not demonstrated, nor is it apparent from the face of the documents how these exceptions apply.³ The Open Records Act places on a governmental body the burden of establishing why and how an exception applies to requested information. Open Records Decision No. 542 (1990). If a governmental body does not establish how and why an exception applies to requested information, there is no basis on which to pronounce it protected. Open Records Decision No. 363 (1983).

You also state that the requestor "is certainly entitled to review the pleadings on file at the County Courthouse and Federal Courthouse." A proper request for records under the Open Records Act may not be dismissed by a governmental body which actually possesses the information even though the request might be more appropriately directed to a different governmental body. Attorney General Opinion JM-266 (1984). Accordingly, if the university or your office possess these documents, they must be released at this time along with all the requested communications between the parties to the lawsuits.

The next open records request is for:

²You also object to the disclosure of "any communications between attorneys and clients as protected by the attorney-client privilege." This office does not interpret this request as one seeking such documents.

³You contend that communications regarding settlement negotiations are protected by both the state and federal rules of civil procedure and evidence. Discovery privileges are not, however, encompassed by section 552.101 of the act, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Open Records Decision No. 575 (1990). Although these records are the type of information that section 552.103, the "litigation exception," was intended to protect, you failed to raise, and have therefore waived, this exception.

All contracts with the City of San Antonio or its subdivisions or departments; all records demonstrating the transfer of funds between the City and the University; all records indicating how any such funds have been applied and/or spent; and all audits of accounts which contain or have contained such funds.

Since the time of the original request, the requestor has narrowed the Emergency Medical Services ("EMS") contracts he seeks to those in effect between 1985 to the present. For all other contracts, he seeks only those only in effect for 1992. You have not argued that these records come under the protection of any of the act's exceptions; we therefore assume that the university intends to release these records.

Although you contend that "[t]o the extent that final audits are the subject of the request, the University submits that Section 3(a)(11) protects the advice, opinions and recommendations contained therein," you have not submitted for our review copies of these documents. Section 552.111 of the Government Code (former section 3(a)(11)) is a discretionary exception that may be waived. *See, e.g.,* Open Records Decision No. 473 (1987) at 2. Because you have not submitted copies of the requested information, the information is public and must be released.⁴ *See* Open Records Decision No. 197 (1978) (refusal to submit copies of requested information results in presumption that the information is public).

The requestor also seeks:

All documents and other information relating to the medical deauthorization of any paramedic or basic EMT by Donald Gordon, MD, and/or any other agent and/or employee of the University.

You apparently object to the release of these documents because they constitute the personnel records of a separate governmental body, *i.e.*, the City of San Antonio. As noted above, the university may not refuse to honor a request for records under the Open Records Act merely because a different governmental body also possesses the documents. Although you contend that former sections 3(a)(1), 3(a)(2), 3(a)(11), and 3(a)(17) apply to these records because the records "would necessarily involve personnel matters and/or disciplinary records of specific individuals which could violate the privacy of these

⁴We further note that in Open Records Decision No. 615 (1993), this office held that:

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters (Emphasis in original.)

Even if you had submitted to this office a copy of the requested audits, this office does not believe that any advice, opinion, or recommendation contained in an audit of financial records would rise to the level necessary to invoke the protection of section 552.111.

employees," this office has no basis for considering the applicability of these exceptions because you have not submitted copies of these documents for our review.⁵ Accordingly, unless you submit copies of these documents to this office within 14 days of the date of this letter with specific portions of the documents marked to indicate the applicable exception, the university must release these documents in their entirety.

In his fifth, sixth, and seventh requests, the requestor seeks:

EMS outcome reports, as are required by regulations of the Texas Department of Health to be maintained by EMS medical directors;

All documents and other records relating to the accreditation of the University's Paramedic program by any organization or agency, including but not limited to self-study reports, statistics submitted, and evaluations and/or inspections of the program by any accrediting or evaluating agency; and

Any and all documents, or copies thereof, related to the American Academy of Orthopaedic Surgeons (AAOS) and/or its subsidiaries indicating the facilities of the University which have been used for AAOS business, and documents indicating funds received for such use of state facilities. Specifically include photography and art department records indicating photographic work performed for the Department of Orthopaedics and/or the University's EMS program. Also specifically include the travel records of James Heckman, MD, Don Gordon, MD, and any other employee and/or agent of the University who has traveled on AAOS business. Also specifically include leave requests by the aforementioned persons.

You have neither submitted copies of these documents to this office for review nor raised any of the act's exceptions with regard to these documents. Consequently, to the extent that the university possesses these records, they must be released to the requestor. *See* Open Records Decision No. 445 (1986) (Open Records Act does not require a governmental body to obtain information not in its possession in response to an open records request).

Finally, the requestor seeks:

⁵We note, however, that information pertaining to disciplinary or grievance proceedings generally do not come under the protection of common-law privacy. *See, e.g.,* Open Records Decision No. 444 (1986). To be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information pertaining solely to a public employee's actions as a public servant cannot be deemed to be outside the realm of public interest. *But see Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied) (regarding complaints of sexual harassment).

The calendars of James Heckman MD, Don Gordon MD, and [University President John Howe, MD], inasmuch as they relate to the activities of these individuals while acting as employees and/or agents of the University or its subdivisions, for all years for which they are available since 1985. Patient names may be redacted.

You contend that the personal calendars of the three named individuals are not subject to the Open Records Act.

Section 552.021(a) of the Government Code provides:

Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

The representative samples of the requested calendars contain both personal and business related entries. To the extent that the notations pertain solely to personal matters, those notations do not fall within the ambit of the request. Accordingly, these entries may be withheld.

On the other hand, the business related entries clearly were created "in connection with the transaction of official business" and therefore are subject to the provisions of the act. Although you also raise former sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(4), 3(a)(5), 3(a)(6), 3(a)(7), 3(a)(8), 3(a)(10), 3(a)(11), 3(a)(14), and 14(e) of the act with regard to these portions of the calendars, you have not demonstrated how these exceptions apply to any particular information. Accordingly, we find that you have not met your burden under section 552.301 of the Government Code with regard to these exceptions. *See* Open Records Decision No. 363. The university must therefore release the calendars except for those portions that pertain solely to personal matters.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/RWP/rho

Ref.: ID# 18325
ID# 18413
ID# 18492
ID# 18479
ID# 18493
ID# 18552

Enclosures: Submitted documents

cc: Curtis P. Clogston, J.D., M.D.
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(w/o enclosures)